

1 KAMALA D. HARRIS
Attorney General of California
2 ELIZABETH S. ANGRES
Supervising Deputy Attorney General
3 GARY OSTRICK
Deputy Attorney General
4 State Bar No. 211031
300 South Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-8055
6 Facsimile: (213) 897-2810
E-mail: Gary.Ostrick@doj.ca.gov

7
8 Attorneys for the State of California, acting
by and through the California Highway
9 Patrol and the Medical Board of California

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13 ROBERT S. MARKMAN,
14 Plaintiff,
15 v.
16 RACHEL LASOTA, et al.,
17 Defendants.

Case No. 2:15-cv-03335-DDP-KLS

**STATE OF CALIFORNIA'S,
ACTING BY AND THROUGH THE
CALIFORNIA HIGHWAY PATROL
AND THE MEDICAL BOARD OF
CALIFORNIA, MOTION TO
DISMISS PLAINTIFF ROBERT
MARKMAN'S COMPLAINT**

18 Judge: Karen L. Stevenson
19 Courtroom: 24

20 Date: October 20, 2015
21 Time: 10:00 a.m.

22 Trial Date: Not set yet
Action Filed: May 4, 2015
23
24
25
26
27
28

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on October 20, 2015, at 10:00 a.m. or as soon
3 thereafter as counsel may be heard in Courtroom 24 of the United States District
4 Court for the Central District of California, located at 312 N. Spring Street, Los
5 Angeles, California, 90012, Defendant State of California, acting by and through
6 the California Highway Patrol (CHP) and the Medical Board of California (Medical
7 Board), will and hereby does move this Court for an order dismissing with
8 prejudice all alleged causes of action under federal and state law in Plaintiff Robert
9 S. Markman's Complaint against the CHP and the Medical Board on the grounds
10 that:

11 1. The CHP and the Medical Board are immune to suit in federal court
12 under the Eleventh Amendment of the United States Constitution.

13 2. The CHP and the Medical Board are not "persons" who may be sued
14 under Title 42, United States Code section 1983.

15 3. The CHP and the Medical Board are immune to Plaintiff's causes of
16 action alleged under California state law under the Eleventh Amendment of the
17 United States Constitution.

18
19 The State's motion to dismiss is brought pursuant to Federal Rules of Civil
20 Procedure 12(b)(1) and 12(b)(6). It is based upon this notice of motion, the
21 attached memorandum of points and authorities, the accompanying declaration of
22 Gary Ostrick, all pleadings and records on file in this action, and on such further
23 authority, evidence, or argument as may be presented at or before the time of any
24 hearing on this motion. This motion is made following a meet and confer letter
25 mailed by Defendants' counsel on August 27, 2015, and a conference between
26 Plaintiff and Defendants' counsel which took place on September 1, 2015.

1 Dated: September 4, 2015 Respectfully submitted,

2 KAMALA D. HARRIS
3 Attorney General of the State of California
4 ELIZABETH S. ANGRES
5 Supervising Deputy Attorney General

6 By: /s/ Gary Ostrick
7 GARY OSTRICK
8 Deputy Attorney General
9 Attorneys for the State of California, acting by and
10 through the California Highway Patrol and the
11 Medical Board of California
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I.**

3 **INTRODUCTION**

4 Plaintiff Robert Markman has sued the California Highway Patrol (CHP), the
5 Medical Board of California (Medical Board), seven of their current and former
6 employees, and persons associated with the College Hospital of Cerritos for events
7 that primarily occurred in May 2014. These events arise from Markman's
8 appearance for a Medical Board probation hearing while wearing only his
9 underwear in public, his subsequent detention by CHP officers, and his
10 psychological evaluation at the College Hospital of Cerritos. He has not alleged
11 any bases for liability against the CHP and the Medical Board other than vicarious
12 liability based on the alleged acts of their employees. Regardless of the factual
13 disputes between Markman and the defendants concerning their alleged acts,
14 Markman has improperly sued the CHP and the Medical Board in this action as a
15 matter of law.

16 Markman's lawsuit alleges twelve (12) causes of action under federal and
17 state law and seeks damages and retrospective relief only. He has brought his First,
18 Fifth, Sixth, and Eighth through Twelfth causes of action against "all defendants,"
19 which presumably includes the CHP and the Medical Board. These causes of
20 action against the CHP and the Medical Board are barred as a matter of well-
21 established law because: (1) the CHP and the Medical Board are agencies of the
22 State of California; thus, Markman's causes of action against them are barred by the
23 Eleventh Amendment of United States Constitution in federal court, (2) the CHP
24 and the Medical Board are not considered "persons" who can be sued under Section
25 1983, and (3) his claims under California law may not be pursued against these
26 state agencies in federal court even under supplemental or pendent jurisdiction.
27 These defects in Markman's claims against the CHP and the Medical Board cannot
28

1 be cured by amendment. Therefore, the CHP and the Medical Board request that
 2 the Court dismiss them with prejudice from this lawsuit.

3 II.

4 **MARKMAN’S COMPLAINT AGAINST THE CHP AND THE MEDICAL 5 BOARD SHOULD BE DISMISSED WITH PREJUDICE**

6 **A. The Standard of Review for a Motion to Dismiss Under Federal 7 Rules of Civil Procedure 12(b)(1) and 12(b)(6).**

8 Markman’s claims against the State of California, acting by and through its
 9 agencies the CHP and the Medical Board, should be dismissed pursuant to Federal
 10 Rules of Civil Procedure 12(b)(1) and 12(b)(6). A motion to dismiss for lack of
 11 subject matter jurisdiction under Rule 12(b)(1) may be either facial or factual. *See*
 12 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial
 13 attack, the allegations in the complaint are challenged as insufficient on their face,
 14 and the Court must assume that the factual allegations in the complaint are true and
 15 draw all reasonable inferences in the plaintiff’s favor. *See Leite v. Crane Co.*, 749
 16 F.3d 1117, 1121 (9th Cir. 2014). Facial assessment of Markman’s complaint shows
 17 that this Court lacks subject matter jurisdiction for his pursuit of his causes of
 18 action against the CHP and the Medical Board.

19 Similarly, dismissal of the CHP and the Medical Board is appropriate pursuant
 20 to Rule 12(b)(6) because Markman cannot state any viable cause of action against
 21 them. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
 22 legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349
 23 F.3d 1191, 1199-1200 (9th Cir. 2003). Dismissal under Rule 12(b)(6) is proper
 24 when a complaint either: “(1) lacks a cognizable legal theory, or (2) fails to allege
 25 sufficient facts to support a cognizable legal theory.” *Somers v. Apple, Inc.*, 729
 26 F.3d 953, 959 (9th Cir. 2013). Review is generally limited to the contents of the
 27 complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).
 28 The Court “must construe the complaint in the light most favorable to the plaintiff
 and must accept all well-pleaded factual allegations as true.” *Shwarz v. United*

1 *States*, 234 F.3d 428, 435 (9th Cir. 2000).

2 “To survive a motion to dismiss, a complaint must contain sufficient factual
3 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Ashcroft v.*
4 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.
5 544, 570 (2007)). A plaintiff’s obligation to provide the grounds of his entitlement
6 to relief “requires more than labels and conclusions, and a formulaic recitation of
7 the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

8 “Threadbare recitals of the elements of a cause of action, supported by mere
9 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

10 The allegations in the complaint “must be enough to raise a right of relief
11 above the speculative level.” *Twombly*, 550 U.S. at 555. Furthermore, the Court
12 should not “accept as true allegations that are merely conclusory, unwarranted
13 deductions of fact, or unreasonable inferences.” *Sprewell*, 266 F.3d at 988.
14 Overall, “[w]here a complaint pleads facts that are merely consistent with a
15 defendant’s liability, it stops short of the line between possibility and plausibility of
16 entitlement to relief.” *Somers*, 729 F.3d at 959 (quoting *Iqbal*, 556 U.S. at 678).
17 Based on these standards, Markman’s allegations against the CHP and the Medical
18 Board fail to “nudge[] [his] claims across the line from conceivable to plausible[,]”
19 and they should be dismissed. *Twombly*, 550 U.S. at 570.

20 **B. Markman’s Causes of Action Against the CHP and the Medical Board**
21 **Are Barred Because They Are Immune to These Claims Under the**
22 **Eleventh Amendment of the United States Constitution.**

23 Markman’s causes of action against the State, including the CHP and the
24 Medical Board, are barred by the Eleventh Amendment of the United States
25 Constitution. The Eleventh Amendment bars the extension of the judicial power of
26 the federal courts “to any suit in law or equity” commenced or prosecuted against
27
28

1 one of the States.¹ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97
 2 (1984). The Eleventh Amendment bars suits against a State in federal court by
 3 citizens of the same State as well as by citizens of another state. *Id.* at 98 (citing
 4 *Hans v. Louisiana*, 135 U.S. 1 (1890)), 100 (quoting *Employees v. Missouri Public*
 5 *Health & Welfare Dep't*, 411 U.S. 279, 280 (1973)). It further proscribes a suit
 6 against the State or one of its agencies absent the consent of the State. *Id.* at 100;
 7 *Papasin v. Allain*, 478 U.S. 265, 276 (1986).

8 Moreover, sovereign immunity under the Eleventh Amendment of the United
 9 States Constitution bars the application of Section 1983 causes of action against
 10 States. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67 (1989); *see*
 11 *also Dittman v. State of California*, 191 F.3d 1020, 1025-26 (9th Cir. 1999)
 12 (holding that agencies of the state are immune from private damage actions in
 13 federal court); *Mitchell v. Los Angeles Cmty. College Dist.*, 861 F.2d 198, 201 (9th
 14 Cir. 1989) (holding state entity has Eleventh Amendment immunity to Sections
 15 1981, 1983, and 1985 claims). Furthermore, the jurisdictional bar of the Eleventh
 16 Amendment applies regardless of the nature of the relief sought. *See, e.g.,*
 17 *Pennhurst*, 465 U.S. at 100; *Krainski v. State of Nev. ex rel. Bd. of Regents of Nev.*
 18 *Sys. of Higher Educ.*, 616 F.3d 963, 967 (9th Cir. 2010). This Eleventh
 19 Amendment immunity to either damages or injunctive relief extends to state
 20 instrumentalities and agencies, such as the CHP and the Medical Board. *Krainski*,
 21 616 F.3d at 967; *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995).

22 The "State" is defined by California law to include its departments and
 23 agencies. Cal. Gov't Code §§ 900.6, 11000(a). The CHP is defined under
 24 California law as being a department within the Transportation Agency. Cal. Gov't

25 ¹ In full, the Eleventh Amendment provides:

26 The judicial power of the United States shall not be construed to
 27 extend to any suit in law or equity, commenced or prosecuted against
 28 one of the United States by citizens of another State, or by citizens or
 subjects of any foreign state.

Code § 13975; Cal. Veh. Code § 2100. Its Commissioner is appointed by the California Governor with the advice and consent of the State Senate. Cal. Veh. Code § 2107. The CHP is also recognized by federal courts in California as a state agency protected by the Eleventh Amendment and immune from suit in federal court. *See, e.g., Keller v. State*, 234 Fed. Appx. 699, 699 (9th Cir. June 11, 2007) (unpub. mem.) (holding that the Eleventh Amendment immunity “clearly applies” to the CHP); *Vazquez v. CHP*, 2015 WL 1743275, at *4 (N.D. Cal. Apr. 6, 2015) (finding the CHP “absolutely immune from suit in federal court”); *Raiser v. CHP*, 2014 WL 5604265, at *2 (C.D. Cal. Sept. 29, 2014) (holding the CHP is “entirely immune from suit in federal court”); *Baker v. State of Cal. Highway Patrol*, 2013 WL 4427199, at *6 (N.D. Cal. Aug. 14, 2013) (dismissing claims against the CHP because “[f]ederal courts have consistently held that the CHP is an ‘arm of the state’ for purposes of the Eleventh Amendment”). Because the CHP is an arm or agency of the State, Section 1983 does not apply to it.

In addition, the Medical Board is the arm of the State responsible for the licensing, regulating, and disciplining of physicians in California. *See, e.g., Cal. Bus. & Prof. Code* §§ 101(b), 2001, 2002, 2004. Thirteen of the Medical Board’s members are appointed by the Governor of California and confirmed by the State Senate, while its remaining two members are appointed by the Senate Rules Committee and the Speaker of the Assembly. *Id.* § 2001. The Medical Board is recognized as a state agency protected by the Eleventh Amendment. *Forster, M.D. v. County of Santa Barbara*, 896 F.2d 1146, 1149 (9th Cir. 1990); *Yoonessi v. Albany Med. Ctr.*, 352 F. Supp. 2d 1096, 1104 (C.D. Cal. 2005). Thus, as with the CHP, Section 1983 does not apply to the Medical Board because it is an arm or agency of the State.

C. Markman’s Section 1983 Causes of Action Are Also Barred Because Neither the CHP Nor the Medical Board Are A “Person” Liable Under Section 1983.

Not only is the CHP and the Medical Board immune to liability under

1 Section 1983 under the Eleventh Amendment, but Markman’s Section 1983 causes
 2 of action cannot be pursued against the CHP and the Medical Board because they
 3 are not considered “person[s]” liable under Section 1983 as a matter of law.
 4 Section 1983 is the vehicle by which persons sue in federal or state court “for
 5 violations of federal rights committed by persons acting under color of state law.”
 6 *Howlett v. Rose*, 496 U.S. 356, 358 (1990). However, Section 1983 “does not
 7 provide a federal forum for litigants who seek a remedy against a State for alleged
 8 deprivations of civil liberties.” *Will*, 491 U.S. at 66. The United States Supreme
 9 Court has declared that a state is not a “person” under Section 1983. *Id.* at 65-66,
 10 71. *Will* establishes that the State and the arms of the State are not subject to suit
 11 under Section 1983 in either federal or state court. *Howlett*, 496 U.S. at 365. As a
 12 result, neither the CHP nor the Medical Board are a “person” liable for violations of
 13 Section 1983, and Markman’s causes of action against them under Section 1983
 14 should be dismissed with prejudice. *See, e.g., Robinson v. Tripler Army Med. Ctr.*,
 15 2009 WL 688922, at *2 (9th Cir. Feb. 13, 2009) (unpub. mem.); *Sykes v. State of*
 16 *California*, 497 F.2d 197, 201-02 (9th Cir. 1974) (holding the California
 17 Department of Motor Vehicles is not a ‘person’ within the meaning of the Civil
 18 Rights Statutes and is thus also immune from suit under Sections 1983 and 1985);
 19 *Carrea v. State of California*, 2010 WL 3984832, at *14 (C.D. Cal. Aug. 25, 2010)
 20 (holding that the California Department of Corrections and Rehabilitation is not a
 21 “person” subject to suit under Section 1983 despite its waiver of its Eleventh
 22 Amendment immunity).

23 **D. Markman’s California State Law Causes of Action Against the CHP and**
 24 **the Medical Board Are Barred Even If Brought Against Them Pursuant**
to Pendent or Supplemental Jurisdiction.

25 Markman also may not pursue any causes of action brought under California
 26 state law against the CHP and the Medical Board in federal court. As stated
 27 previously, the Eleventh Amendment bars suits against a State in federal court by
 28 citizens of the same State. *Pennhurst*, 465 U.S. at 98. “[A] claim that state officials

1 violated state law in carrying out their official responsibilities is a claim against the
 2 State that is protected by the Eleventh Amendment.” *Id.* at 121. Moreover, the
 3 U.S. Supreme Court recognized, “it is difficult to think of a greater intrusion on
 4 state sovereignty than when a federal court instructs state officials on how to
 5 conform their conduct to state law.” *Id.* at 106.

6 This principle of Eleventh Amendment immunity applies to state law claims
 7 brought into federal court under pendent or supplemental jurisdiction. *See id.* at
 8 121; *see also Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1134 (9th Cir.
 9 2006) (holding Unruh Act claim barred by state sovereign immunity); *Cholla*
 10 *Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973-74 (9th Cir. 2004) (affirming
 11 dismissal of the plaintiff’s state law claims). The Supreme Court has specifically
 12 held that Title 28, United States Code section 1367(a), which provides district
 13 courts with supplemental jurisdiction over state law claims, “does not extend to
 14 claims against nonconsenting state defendants.” *Raygor v. Regents of the Univ. of*
 15 *Minn.*, 534 U.S. 533, 541-42 (2002). As a result, the Court should find that
 16 Markman is barred from bringing suit against the State for his Eighth through
 17 Twelfth Causes of Action in federal court.

18 III.

19 LEAVE TO AMEND SHOULD BE DENIED AS FUTILE

20 A complaint can be dismissed without leave to amend when amendment
 21 would be futile. “Although there is a general rule that parties are allowed to amend
 22 their pleadings, it does not extend to cases in which any amendment would be an
 23 exercise in futility, or where the amended complaint would also be subject to
 24 dismissal.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)
 25 (citations omitted). It is well established that “[f]utility alone can justify the denial
 26 of a motion for leave to amend.” *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir.
 27 2004); *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).

28 The “proper test to be applied when determining the legal sufficiency of a

1 proposed amendment is identical to the one used when considering the sufficiency
 2 of a pleading challenged under Rule 12(b)(6).” *Miller v. Rykoff-Sexton, Inc.*, 845
 3 F.2d 209, 214 (9th Cir.1988). Therefore, the Court should assess whether the
 4 proposed amendments allege “enough facts to state a claim for relief that is
 5 plausible on its face.” *Labrador v. Seattle Mortgage Co.*, 681 F. Supp. 2d 1106,
 6 1115 (N.D. Cal. 2010) (applying the Rule 12(b)(6) standard from *Iqbal* and
 7 *Twombly*).² The Court’s dismissal of Markman’s claims against the CHP and the
 8 Medical Board should be with prejudice because no amendment will overcome
 9 their entitlement to sovereign immunity under the Eleventh Amendment. *See, e.g.*,
 10 *Smittick v. Cal. Workers Compensation Appeals Bd.*, 2010 WL 1929779, at *3
 11 (C.D. Cal. May 11, 2010) (dismissing for lack of subject matter jurisdiction because
 12 no amendment can cure the barring of claim by Eleventh Amendment immunity);
 13 *Yoonessi*, 352 F. Supp. 2d at 1104 (holding that leave to amend would be futile
 14 because “no amendment will overcome the Medical Board of California’s
 15 entitlement to sovereign immunity”).

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 _____
 27 ² *See also Franczak v. Suntrust Mortgage Inc.*, 2013 WL 4764327, at *2
 28 (N.D. Cal. Sept. 5, 2013); *Williams v. County of Ventura*, 2009 WL 4110113, at
 *14 (C.D. Cal. Nov. 24, 2009).

IV.

CONCLUSION

As the foregoing demonstrates, Markman is unable to state any cause of action against the CHP or the Medical Board under Section 1983 or California state law in federal court. Thus, his complaint should be dismissed with prejudice as to all claims brought against the CHP and the Medical Board.

Dated: September 4, 2015 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of the State of California
ELIZABETH S. ANGRES
Supervising Deputy Attorney General

By: /s/ Gary Ostrick
GARY OSTRICK
Deputy Attorney General
Attorneys for the State of California, acting by and
through the California Highway Patrol and the
Medical Board of California

CERTIFICATE OF SERVICE

Case Name: ***Robert S. Markman v. Rachel LaSota, et al.***

Case No. **2:15-cv-03335-DDP-KLS**

I hereby certify that on September 4, 2015, I electronically filed the following document(s) with the Clerk of the Court by using the CM/ECF system:

**STATE OF CALIFORNIA'S, ACTING BY AND THROUGH THE
CALIFORNIA HIGHWAY PATROL AND THE MEDICAL
BOARD OF CALIFORNIA, MOTION TO DISMISS PLAINTIFF
ROBERT MARKMAN'S COMPLAINT**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On September 4, 2015, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Robert S. Markman
18554 Frankfort Street
Northridge, CA 91324

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2015, at Los Angeles, California.

Virginia Gow
Declarant

/s/ Virginia Gow
Signature